Supreme Court, U.S.
FILED
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No._____

In The
Supreme Court of the United States
October Term, 1999

ARTHUR HENRY GARRISON,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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1504

QUESTIONS PRESENTED

1. here are several chemical procedures for manufacturing cocaine base from the salt form, cocaine hydrochloride. In November 1993, the Sentencing Commission amended the sentencing Guidelines to define the enhanced sentence for "cocaine base" as being usually made from sodium bicarbonate. The Federal Circuits are split on whether the 100 to 1 sentencing enhancement applies to all cocaine base convictions or to just the "crack cocaine".

Do the sentencing guidelines enhancement apply to any cocaine base or to just the "crack cocaine" manufactured using sodium bicarbonate?

2. If the defendant does not know whether the drugs sold by him were "crack" pursuant to the guidelines definition, but the defendant accepted responsibility for his acts, should the trial court deny a reduction for accepting responsibility because the defendant did not know the manufacturing process for the drugs?

3. If the sentencing enhancement applies only to "crack cocaine", manufactured using sodium bicarbonate, should the evidence of the type of cocaine base require either expert scientific chemical analysis and testimony, or direct testimony of a witness to the actual manufacturing of the drug?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES.....iii

PETITION FOR WRIT OF CERTIORARI.....1

OPINIONS BELOW.....1

JURISDICTION.....1

STATUTES INVOLVED IN THIS CASE.....2

STATEMENT OF THE CASE.....2

REASONS FOR GRANTING THE WRIT.....3

I. THE FOURTH CIRCUIT'S OPINION DIRECTLY CONFLICTS WITH RULINGS OF THE 3RD, 5TH, 7TH AND 11TH CIRCUIT COURTS OF APPEAL.....3

II. ERROR IN THE APPLICATION OF THE DOWNWARD REDUCTION FOR ACCEPTANCE OF RESPONSIBILITY AND THE SAFETY VALVE PROVISION.....5

CONCLUSION.....6

APPENDIX A.....App-1

APPENDIX B.....App-7

TABLE OF AUTHORITIES

CASES

Page

U.S. v. Adams, 125 F. 3d 586 (7th Cir. 1997).....4

U.S. v. Garrett, 189 F.3d 610 (7th Cir. 1996).....4

U.S. v. James, 78 F.3d 851 (3rd Cir. 1996).....5

U.S. v. Munoz-Realpe, 21 F.3d 375 (11th Cir. 1994).....5

STATUTES AND RULES

18 U.S.C. §§3161-3174 (1994).....2

18 USC §3553(f).....2,3

21 USC §846 (1994).....2

28 U. S. C. §1254(1).....2

28 U.S.C. §1291.....1,2

USSG §2D1.1(c).....2

USSG § 2D1.1 Note (D).....2,3

USSG § 3E1.1 (1997).....2,3

UNITED STATES SUPREME COURT, RULE 10(a)...5

PETITION FOR WRIT OF CERTIORARI

Arthur Henry Garrison (Petitioner), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on October 19 1999.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, that gives rise to this petition, is unpublished by order of the Fourth Circuit. It is reprinted in Appendix A hereto (App. A) at pages App-1 to App-6. By order submitted September 14, 1999, the Fourth Circuit affirmed this petitioner's conviction and sentencing in the district court. Among other findings, the Appeals Court found that the guidelines sentencing enhancement applies to any cocaine base, regardless of its' manufacturing process. Petitioner filed a petition for rehearing and suggestion for rehearing en banc which was timely filed. App. B, pages App-7 and App-8. The Court of Appeals for the Fourth Circuit denied the petition for rehearing on October 19, 1999.

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JURISDICTION

The judgement of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals") was entered on September 14, 1999. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291. The Court of Appeals denied a timely filed petition for rehearing and suggestion for rehearing en banc on October 19, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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STATUTES INVOLVED IN THIS CASE

18 U.S.C. §§3161-3174 (1994)

18 USCA §3553(f)

21 USC §846 (1994)

28 U. S. C. §1254(1)

28 U.S.C. §1291

USSG §2D1.1(c)

USSG §2D1.1 Note (D)

USSG §3E1.1 (1997)

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STATEMENT OF THE CASE

Arthur Henry Garrison appealed his conviction and 130-month sentence, imposed after a jury found him guilty of conspiracy to distribute cocaine base in violation of 21 U.S.C. §846 (1994). He asserted on appeal that he was not timely tried as required by the Speedy Trial Act, 18 U.S.C. §§3161-3174 (1994), that the Government failed to prove at sentencing that the drugs were "crack cocaine", that the district court erred by not

applying the "safety valve" provision in 18 U.S.C.A. §3553(F) (West Supp. 1998), and that the court should have awarded him a reduction for acceptance of responsibility under U.S. Sentencing Guidelines Manual §3E1.1 (1997). Appellant appeals only the sentencing aspect of the case as to the application of the guideline's enhancement for selling "crack", failure of the trial court to grant him a reduction for his plea of guilty, and failure to apply the "safety valve" provision.

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REASONS FOR GRANTING THE WRIT

I. Conflict in the Federal Judicial Circuits in the application of the Sentencing Guidelines.

The United States Sentencing Guidelines (USSG), have engendered much controversy since their inception in 1987. The most controversial provision of the Sentencing Guidelines has been the 100:1, quantity ratio of "crack cocaine" to "powder cocaine", e.g., one gram of "crack cocaine" is equal to 100 grams of "powder cocaine" for the purpose of applying the sentencing guidelines.

On December 31, 1992, the United States Sentencing Commission, ("The Commission"), published in the Federal Register a notice of proposed amendments that, among other things, requested comment on whether the Commission should recommend that Congress modify or eliminate the provisions distinguishing the penalties for "powder cocaine" from "crack cocaine".

The Commission solicited comment on the sentencing issue from the American Bar Association, the American Civil Liberties Union, the US Department of Justice, the Drug Enforcement Administration, Families Against Discriminative Crack Laws, Families Against Mandatory Minimums, The

Federal Public Defenders, the National Association for the Advancement of Colored People, the National Association of Criminal Defense Lawyers, the Office of National Drug Control Policy, the Sentencing Commission's Practitioner's Advisory Group, and Probation Officers Advisory Group. The Commission received approximately 1,900 letters supporting the discontinuation of the 100:1 sentencing ratio. The only clear support for continuation was from the Department of Justice.

Further, in 1993, the Commission attempted to clarify the sentencing issue between "crack", a form of "cocaine base" manufactured easily by mixing cocaine hydrochloride with baking soda, (a powder commonly available in grocery stores) from "cocaine base" prepared by other, more difficult manufacturing processes.

The Guidelines now read:

> "Cocaine base", for the purposes of this guideline, means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form." *See: USSG § 2D1.1 Note (D).*

Since the 1993 Sentencing Commission distinction of "crack" cocaine base from cocaine base manufactured by other methods, the federal circuits have split on this issue.

On one side, the circuits have ruled that the sentencing enhancement applies only to "cocaine base" manufactured in the inexpensive, and simple process of mixing cocaine hydrochloride with baking soda. (Circuits 3, 5, 7, & 11). *See: U.S. v. Adams*, 125 F.3d 586 (7th Cir. 1997), ***"...under the new definition of "cocaine base" found in the guidelines only the form of "cocaine base" which is "crack" is eligible for the enhanced sentence."*** *See: U.S. v. Garrett*, 189 F.3d 610 (7th Cir 1996) ***"Subsequent to the amendment, this court held that***

the Government has the burden of proving by a preponderance of the evidence that the drug distributed was "crack" instead of another form of cocaine base." **The court further observes;** ***"A defendant's admission that he distributed "crack", as opposed to another form of cocaine, must be knowing and voluntary."***

See: U.S. v. James, 78 F.3d 851 (3rd Cir. 1996), ***"...the (trial) court erred in its application of the Sentencing Guidelines enhancement for "crack" in absence of proof by a preponderance of the evidence that the form of cocaine base James sold was actually "crack."*** *See: U.S. v. Munoz-Realpe*, 21 F.3d 375 (11th Cir. 1994), observing that effective November 1993, the Sentencing Commission amended §2D1.1 of the Guidelines to include the definition of "crack" and asserting that the Commission was addressing an inter-circuit conflict.

On the other side, the circuits have ruled that any cocaine base is "crack", that the 100:1 enhancement applies to any cocaine base, and therefore the method of manufacturing is irrelevant. (Circuits 2, 4, 6, & 10).

This issue is ripe for a decision of this Court, in order to remove the conflict between the circuits, pursuant to Rule 10(a) of the United States Supreme Court Rules.

II. Error in the application of the downward reduction for acceptance of responsibility and the safety valve provision.

In the case at bar, the Government offered no scientific evidence that the drugs sold by Arthur Garrison were "crack", within the definition of the Sentencing Commission Guidelines.

The petitioner lacks education and is a person without any knowledge as to the method of manufacturing process used in the making the drugs that he accepted responsibility for selling. The Government put on no evidence that the defendant

participated in manufacturing the drugs sold, or that he knew, or could tell the difference in the forms of cocaine base.

The petitioner accepted responsibility for his criminal acts but was unable to agree that he knew the drugs were "crack". Under these circumstances the Government should have granted him a downward departure for acceptance of responsibility.

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CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,
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APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ARTHUR GARRISON,
Defendant-Appellant.

No. 98-4696

Appeal from the United States District Court
for the Western District of Virginia, at Charlottesville.
James H. Michael, Jr., Senior District Judge.
(CR-97-83)
Submitted: March 9, 1999

Decided: September 14, 1999

Before ERVIN, NIEMEYER, and MICHAEL,
Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Roy D. Bradley, BRADLEY LAW FIRM, P.C., Madison, Virginia, for Appellant. Robert P. Crouch, Jr., United States Attorney, Ray B. Fitzgerald, Jr., Assistant United States Attorney, Charlottesville, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Arthur Henry Garrison appeals his conviction and 130-month sentence imposed after a jury found him guilty of conspiracy to distribute cocaine base in violation of 21 U.S.C.§846 (1994). He asserts on appeal that he was not timely tried as required by the Speedy Trial Act, 18 U.S.C.§§3161-3174 (1994), the Government failed to prove at sentencing that the drugs were crack cocaine, the district court erred by not applying the "safety valve" provision in 18 U.S.C.A.§3553(F) (West Supp. 1998), and the court should have awarded him a reduction for acceptance of responsibility under U.S. Sentencing Guidelines Manual §3E1.1 (1997). Finding no reversible error, we affirm.

I.

Garrison first asserts that his rights under the Speedy Trial Act were violated because he was not tried within seventy days after he was indicted. See 18 U.S.C. §3161(c)(1). We review de novo legal conclusions of the district court related to its interpretation of the Speedy Trial Act, *see United States v. Jarrell*, 147 F.3d 315, 317 (4th Cir.) cert. denied, __ U.S. ___, 67 U.S.L.W. 3271 (U.S. Oct. 19, 1998) (No.. 98-6105), and review for clear error the underlying factual findings. *See United States v. Stoudenmire*, 74 F.3d 60, 63 (4th Cir. 1996).

Specifically, Garrison contends that his trial should not

have been delayed by the continuance granted in a co-defendant's case because the Speedy Trial Act governs co-defendants joined for trial - not merely co-defendants named in the same indictment. Because his co-defendant, Fred T. Morgan, pled guilty, Garrison asserts that Morgan was not joined for trial and that the time Morgan's trial was continued should not have been excluded from the speedy trial calculation. Garrison, however, was timely tried under the Speedy Trial Act.* His claim that Morgan's continuance should have been excluded must fail because there was never a motion for severance granted. See 18 U.S.C. §3161(h)(7) and (8) that refers to "*the* defendant" rather than "*any* defendant," which appears in other sub-sections of §3161, and his argument that Morgan's continuance should not be excluded because it was not a continuance granted for Garrison - *the* defendant. Therefore, the district court properly excluded the time granted for Morgan's continuance from the speedy trial calculation. *See United States v. Sarno*, 24 F.3d 618, 622 (4th Cir. 1994).

II.

Garrison next contends that the Government failed to prove at sentencing that the drugs were crack cocaine because there was no evidence presented that the drugs were processed with sodium bicarbonate. Contrary to Garrison's assertion, however, the guidelines state that crack cocaine "usually" possesses sodium bicarbonate. See USSG §2D1.1(c), note (D). Garrison relies on *United States v. James*, 78 F.3d 851 (3d Cir. 1996), to support his claim that the Government failed to prove that the drugs were crack cocaine, but his reliance is misplaced.

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*Twenty-three days elapsed between Garrison's arraignment and Morgan's motion for a continuance. Once the court granted the 120-day continuance from the February 18, 1998, trial date, the speedy trial clock restarted on June 18. Garrison had to be

tried by August 4, 1998 - the expiration of the 70-day period. Garrison's trial commenced on June 10, 1998.

Here, unlike in *James*, the evidence is unambiguous - the record discloses no indication that the cocaine attributed to Garrison was in any form of cocaine base other than crack. *See United States v. Hall*, 109 F.3d 1227, 1235-36 (7th Cir.), *cert. denied*, ___ U.S. ___, 66 U.S.L.W. 3258 (U.S. Oct. 6, 1997) (No. 96-9561).

The indictment in this case indicated that Garrison was charged with conspiracy to distribute "cocaine base, or 'crack'." While the indictment alone is not sufficient to prove the type of drugs involved, *see United States v. Fletcher*, 74 F.3d 49, 53 (4th Cir. 1996), it is further evidence that the drugs are "crack." In addition, the drugs were introduced into evidence, giving the jurors an opportunity to examine the drugs themselves, and the presentence report specifically identifies the drugs as crack cocaine. The jurors also heard numerous users testify that they purchased crack cocaine from Garrison in his garage and that they never purchased powder cocaine from Garrison. Most importantly, trained narcotic agents testified that the Government exhibits, which were the drugs seized from Garrison's garage, appeared to be crack cocaine. *See United States v. Dolan*, 544 F.2d 1219, 1221 (4th Cir. 1976) (holding that lay testimony and circumstantial evidence is sufficient, in and of itself, to establish the identity of controlled substances); *United States v. Boissoneault*, 926 F. 2d 230, 233 (2d Cir. 1991) ("Agents may also offer their interpretations of any physical evidence that is properly before the jury.") (citations omitted). Finally, Garrison offered no proof that the drugs were any other form of cocaine base. Therefore, the district court did not clearly err in sentencing Garrison under the enhanced penalties for crack cocaine. *See United States v. Blake*, 81 F. 3d 498, 503 (4th Cir. 1996) (stating standard of review).

III

Garrison next asserts that the district court erred in failing to apply the "safety valve" provision under 18 U.S.C. §3553(f) and to award a reduction for acceptance of responsibility under USSG §3E1.1. Garrison does not appear to have met the requirements for a departure under §3553(f) because he failed to provide all information concerning the offense to the Government prior to or at sentencing. Garrison objected to the probation officer's characterization of the drugs as crack cocaine, thereby continuing to deny that the drugs involved in the conspiracy were crack. Because Garrison does not meet all of the requirements set forth in §3553(f), he is ineligible for a reduction under the "safety valve" provision. *See United States v. Withers*, 100 F.3d 1142, 1147 (4th Cir. 1996) (stating that defendants must acknowledge responsibility for actions before qualifying for safety valve reduction), *cert. denied*, ___ U.S. ____, 65 U.S.L.W. 3631 (U. S. Mar. 17, 1997) (No. 96-7884).

As for Garrison's claim that the district court should have awarded a reduction for acceptance of responsibility, Garrison required the Government to prove at trial that the drugs were crack cocaine. The issue he sought to raise by means of a trial therefore related to factual guilt. *See United States v. Dickerson*, 114 F.3d 464, 470 (4th Cir. 1997). In this circumstance, the district court did not clearly err in finding that the reduction should not apply. *See* USSG §3E1.1, comment, (n.2); *United States v. Castner*, 50 F.3d 1267, 1279-80 (4th Cir. 1995).

IV.

Accordingly, we affirm Garrison's conviction and

sentence. We deny Garrison's motion for oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

For the Court,

/s/

_____

CLERK

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
October 19, 1999

No. 98-4696
CR-97-83

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ARTHUR GARRISON

Defendant - Appellant

On Petition for Rehearing and Rehearing En Banc

The Appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

The denial of the rehearing is entered by a quorum of the panel pursuant to 28 U.S.C. section 46(d).

For the Court,

/s/ Patricia S. Connor

CLERK